No. 92-1637

Supreme
F I
JUN - 1 1993
OFFICE OF THE CLERK
Supreme Court, U.S.
FILED
JUN - 1 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

IRENE M. IBARRA, in her official capacity as the Executive Director of the COLORADO DEPARTMENT OF SOCIAL SERVICES; HENRY SOLANO, in his official capacity as the Executive Director of the COLORADO DEPARTMENT OF INSTITUTIONS; ROBERT BAUSERMAN, ROBBIE L. BEAN, SUSANNE D. DOSH, DENNIS FISHER, MARY KYER, PEGGY STOKSTAD, JOHN P. STONE, and RICHARD F. WALKER, in their official capacities as members of the COLORADO BOARD OF SOCIAL SERVICES,

Petitioners,

vs.

DUC VAN LE, on behalf of himself and the class of persons similarly situated,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

John R. Holland*
LAW OFFICES OF
JOHN ROBERT HOLLAND,
A PROFESSIONAL CORPORATION
733 East 8th Avenue
Denver, Colorado 80203
Telephone: (303) 860-1331

Kathleen Mullen
Benjamin I. Sachs
LAW OFFICE OF
KATHLEEN MULLEN, P.C.
733 East 8th Avenue
Denver, Colorado 80203
Telephone: (303) 894-0995

***Counsel of Record**

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
ADDITIONAL STATUTES AND REGULATIONS INVOLVED IN THIS CASE WHICH WERE NOT CITED BY PETITIONERS	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	19
ARGUMENT	20
I. There is no special or important reason for certiorari review of the opinions below, which have no effect as legal precedent in any court	20
II. The trial court's ruling that Petitioners violated the requirements of § 504 of the Rehabilitation Act of 1973, as amended, and 45 C.F.R. §84.4(b), is correct and not in conflict with any applicable decision of a United States Court of Appeals or of this Court	21
III. The trial court's equal protection analysis is correct and not in conflict with any applicable decision of this Court or of a United States Court of Appeals	30
CONCLUSION	39
CERTIFICATE OF MAILING	42
APPENDIX	43

TABLE OF AUTHORITIES

CASES

Alexander v. Choate,
469 U.S. 287 (1984) 24

Beckwith v. Kizer,
912 F.2d 1139 (9th Cir. 1990) 27-28

Bradley v. Richmond School Board,
416 U.S. 696 (1974) 38

City of Cleburne v. Cleburne Living Center, Inc.,
473 U.S. 432 (1985) 30,35-38

Doe v. Cowherd,
770 F.Supp. 354 (W.D. Ky. 1991) 35

Goebel v. Colorado Dept. of Institutions,
764 P.2d 785 (Colo. 1988) 25

Homeward Bound, Inc. v. Hissom Memorial Center,
No. 85-C-437-E (N.D. Okla. July 24, 1987)
[available on WESTLAW, 1987 WL 27104] 25

Lynch v. Maher,
507 F.Supp. 1268 (D. Conn. 1981) 25

Massachusetts Bd. of Retirement v. Murgia,
427 U.S. 307, 313 (1976) 37

People ex rel. Walker v. Stapleton,
79 Colo. 629, 630, 247 P. 1062 (1926) 20

San Antonio School District v. Rodriquez,
411 U.S. 1, 28 (1973) 37

Sites v. McKenzie,
423 F. Supp. 1190 (N.D. Va. 1976) 25

South Carolina v. Katzenbach,
383 U.S. 301 (1966) 38

United States v. Carolene Products Co.,
304 U.S. 144, 152-53, n.4 (1938) 37

CONSTITUTIONAL PROVISIONS

Equal Protection Clause of the
Fourteenth Amendment to the
United States Constitution 4,20,28-31,35-40

STATUTES

42 U.S.C.A. § 1396n (West 1992) 7,22,25,27,28

Section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C.A. I 12101-12213 (1992) 3-4,20-21,27,30

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988) 2,6,16,19,21-26,28-29,40

Section 1915(c) of the Social Security Act . . . . 7-9,14,22,25, ... 27,29,31-33

OTHER AUTHORITIES

42 C.F.R. § 441.302 (1990) 8

45 C.F.R. § 84.4 (1991) 2,19,21,26,29,40

No. 92-1637

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

IRENE M. IBARRA, in her official capacity as the Executive Director of the Colorado Department of Social Services; HENRY SOLANO, in his official capacity as the Executive Director of the Colorado Department of Institutions; ROBERT BAUSERMAN; ROBBIE L. BEAN; SUSANNE D. DOSH; DENNIS FISHER; MARY KYER; PEGGY STOKSTAD; JOHN P. STONE AND RICHARD F. WALKER in their official capacities as members of the Colorado Board of Social Services,
Petitioners,
vs.

DUC VAN LE, on behalf of himself and the class of persons similarly situated,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Colorado Supreme Court's affirmance of the trial court's ruling is reported at 843 P.2d 15 (Colo. 1992).

Although the Colorado Supreme Court issued a prior written opinion on April 20, 1992, which is reprinted by Petitioners in Appendix B to their Petition for Writ of Certiorari, that opinion was withdrawn on May 28, 1992, and did not even become an officially published opinion. The Order of the Court completely withdrawing the prior written opinion of April 20, 1992, and requiring supplemental briefing on five additional questions propounded by the Colorado Supreme Court, is unpublished, but is reproduced in Exhibit B hereto.

ADDITIONAL STATUTES AND REGULATIONS INVOLVED IN THIS CASE WHICH WERE NOT CITED BY PETITIONERS

45 C.F.R. §84.4(b) (1991), which interprets and implements § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988), states in relevant part as follows:

> (b) Discriminatory actions prohibited.
>
> (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:
>
> (i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;
>
> (ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;
>
> (iii) Provide a qualified handicapped person with an aid, benefit, or service that is not effective as that provided to others;
>
> (iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits or services that are as effective as those provided to others;
>
> (v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipient's program;
>
> ....
>
> (vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit or service.

> (2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and non-handicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.
>
> (3) Despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such programs or activities that are not separate or different.
>
> (4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common control or are agencies of the same State.

The Americans With Disabilities Act of 1990, 42 U.S.C. § 12132, states as follows:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

As recognized by Congress in its legislative findings in the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a)(7), individuals with "disabilities"[1] are a:

---

[1] The ADA defines the term "disability" as "a physical or mental impairment that substantially limits" one or more of an individual's "major life activities," and mental impairment includes mental illness. 42 U.S.C.

> discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

STATEMENT OF THE CASE

Nowhere in the Petition for Writ of Certiorari have Petitioners recounted to this Court the actual Stipulated Facts that were jointly submitted by the parties to the trial court below, and dominated all subsequent proceedings. These case critical Stipulated Facts, which describe the essential events precipitating this lawsuit and the factual bases for Respondents' claims, are reproduced in Exhibit A hereto.

It is these undisputed facts, expressly "accept[ed] as true and incorporated" into the Decision and Order of the trial court below, which, in addition to 13 additional findings of fact made by the trial court, supply the basic premises for that court's ruling that Petitioners' overt policy and practice of denying individuals who are designated as mentally ill the opportunity to benefit from the services outlined in Colorado's Home and Community Based Services (HCBS) program, "solely on the basis that their primary diagnosis is mental illness" (Stipulated Fact No. 46), violates the federal statutory and constitutional equal protection rights of Respondents.

---

§ 12102(2)(A); H. Rep. No. 101-485(II), 101st Cong., 2d Sess. 333 (1990).

The unassailable record established in the trial court below reveals the following background.

Petitioners are officials or employees of the State of Colorado. (Stipulated Fact No. 24) Petitioner Irene M. Ibarra is the director of the Colorado Department of Social Services ("CDSS"), which is a principal department of the State of Colorado, and in her official capacity is responsible for the administration and supervision of all public assistance programs in the State of Colorado, including the Medicaid program. (Stipulated Fact No. 22)

Petitioners Robert Bauserman, Robbie Bean, Suzanne Dosh, Mary Kyer, Peggy Stokstad, John Stone, Richard Walker, Dennis Fisher and David Trujillo are members of the Colorado Board of Social Services ("CBSS") and are, in their official capacities, responsible for the promulgation and repeal of rules and regulations governing the Medicaid program's scope and content, including the rights of recipients and the allocation of Medicaid benefits among eligible persons. (Stipulated Fact No. 21)

Petitioner Henry Solano was (but is no longer) the director of the Colorado Department of Institutions ("DOI"). In his official capacity and in conjunction with the Department of Social Services, he was delegated certain responsibilities and authority to provide home and community based services for the mentally ill under C.R.S. §26-4.5-204. (Stipulated Fact No. 23)

Respondent Duc Van Le ("Le") is a disabled 35 year old man, with a history of schizophrenia going back to at least 1982. (Stipulated Fact Nos. 1, 6) In addition, he has a significant

learning disability associated with a speech impediment in his native language of Vietnamese, and suffers from tardive dyskinesia, a motor defect secondary to his medication for schizophrenic behavior. (Stipulated Fact No. 6).

It has been stipulated that Le, and the class of persons he represents,[2] are protected handicapped individuals within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulations. (Stipulated Fact No. 55)

Le receives Social Security Disability benefits of $374 monthly. (Stipulated Fact No. 14) When Le has been institutionalized, Medicaid reimbursement covers the cost. (Stipulated Fact No. 6) Because of his mental illness, Le has been in and out of hospitals and nursing homes numerous times. (Stipulated Fact Nos. 4-6) Le's behavior is, at times, relatively stable so that he can function appropriately. At other times, his behavior is highly disruptive and violent. (Stipulated Fact No. 8)

In February 1988, Le was transferred out of a nursing home and into an independent living situation. (Stipulated Fact Nos. 9, 10) With assistance and supervision provided to him by the Atlantis Community, Inc., a disability rights organization, Le has remained

---

[2] The class of persons represented by Le, as certified by the trial court below, is composed of all low income residents of Colorado who, because of their mental illness, qualify for skilled or intermediate care under Title XIX of the Social Security Act, but who have been and are being deprived by the State of Colorado of home and community based services under Title XIX of the Social Security Act, which are necessary to meet their needs, solely on the basis of their mental illness, although such services are provided to physically disabled adults, and who claim that this deprivation violates their rights under the Social Security Act, the Rehabilitation Act of 1973, and the Fourteenth Amendment of the United States Constitution. (Stipulated Fact No. 25)

relatively stable since 1988. Transfer out of the nursing home and into the independent living situation has allowed Le to progress in ways previously unattainable for him. (Stipulated Fact No. 10)

HCBS Programs Operated by the State of Colorado

HCBS programs are statutorily authorized by Section 1915(c) of the Social Security Act. This provision of the Social Security Act authorizes HCBS for: elderly, blind and physically disabled persons; mentally ill persons; and developmentally disabled persons. This statute has been continuously in effect from the 1970's to the present. (Stipulated Fact No. 26)

The purposes of the HCBS programs are to prevent unnecessary institutionalization of the above three populations, to contain the costs of long-term nursing home care and to provide more appropriate community based services for these populations. (Stipulated Fact No. 27)

The HCBS programs operated by the State of Colorado receive federal financial assistance. (Stipulated Fact No. 56) The HCBS programs are jointly funded by the federal government and states, with the federal government paying between 50% and 75% of the cost under the Medicaid Title XIX program. (Stipulated Fact No. 28)

In order to secure this financial reimbursement for HCBS programs, states must submit Section 1915(c) waiver applications to the federal government and must demonstrate, among other requirements, that the cost of HCBS programs is <u>less</u> than the cost of Medicaid reimbursed nursing home care for eligible individuals.

42 U.S.C. Section 1396n(c)(2)(D); 42 C.F.R. 441.302; Section 26-4.5-104.5(3) C.R.S. 1989. (Stipulated Fact No. 29)

From 1982 to 1985, the State of Colorado, pursuant to specific authorizing legislation, sought and obtained §1915(c) waivers from the federal government and provided services under Title XIX of the Social Security Act not only to the elderly, blind, physically disabled and developmentally disabled, but also to the mentally ill. Stipulated Fact Nos. 30, 31)

In 1985, the State of Colorado applied for an extension of its HCBS mentally ill waiver program. The federal government requested that the state withdraw its initial application and resubmit it. The state did so. (Stipulated Fact No. 32; Stipulated Exhibit No. 1).

In its resubmitted 1985 application, the State of Colorado gave assurances to the federal government that it could operate an HCBS program for mentally ill persons at a lesser cost than would be required to institutionalize such persons in skilled or intermediate care nursing homes. (Stipulated Fact No. 33)

The State of Colorado's resubmitted HCBS/mentally ill waiver request was denied by the federal government for reasons set forth in an October 25, 1985 letter from C. McClain Haddow, Acting Administrator of the Health Care Financing Administration of the U.S. Department of Health and Human Services, to George S. Goldstein, Director of the Colorado Department of Social Services. (Stipulated Fact No. 34; Stipulated Exhibit No. 2).

After receiving the federal government's denial of its 1985 HCBS program for the mentally ill waiver request, the State of Colorado chose not to submit a revised application. (Stipulated Fact No. 35)

As a result, the CBSS enacted regulations which terminated the HCBS/mentally ill program, although the state legislation governing such a program remained in effect. (Stipulated Fact No. 36)

From 1985 to the present, Colorado has not operated an HCBS §1915(c) waiver program for the mentally ill. (Stipulated Fact No. 37) The State of Colorado, under Section 1915(c) of the Social Security Act, could submit a waiver request for the mentally ill population under which it could provide the very same services that are currently being provided to the elderly, blind and physically disabled persons. (Stipulated Fact No. 44)

Description of HCBS Benefits

Since 1985, Colorado has continued to operate HCBS §1915(c) waiver programs for the elderly, blind and physically disabled and for developmentally disabled persons. (Stipulated Fact No. 38) The HCBS program for elderly, blind and physically disabled persons and for developmentally disabled persons is designed to allow such persons to live independently in the community and to avoid more costly skilled and intermediate care nursing home placements which they would otherwise require if not provided services under the HCBS program. (Stipulated Fact No. 39)

The HCBS program services for elderly, blind and physically disabled persons include the following: home health services;

personal care services; respite care services; nonmedical transportation services; environmental home modification and electronic monitoring services; case management services; homemaker services; and adult day care services. (Stipulated Fact No. 40)

Homemaker services under the HCBS program for elderly, blind and physically disabled persons include assistance with general household activities (e.g., preparation of meals, routine household techniques that promote self care, independent living and nutrition), and incidental personal care. (Stipulated Fact No. 41)

Personal care services under the HCBS program for elderly, blind and physically disabled persons include assistance with personal hygiene, dressing and eating, ambulatory needs (e.g., transportation necessary to provide access to services), and household tasks incidental to the persons's health care needs or otherwise necessary to maintain the person at home. These and the other above-described HCBS program components for elderly, blind and physically disabled persons are set forth in full detail in C.R.S. §26-4.5-103. (Stipulated Fact No. 42)

It has been stipulated that HCBS would be of great benefit to Le and the class of persons he represents. (Stipulated Fact No. 43) Indeed, the former Executive Director for the Department of Social Services, George Goldstein, referred to these same services in 1985 as being "essential to the care and treatment of the long term mentally ill population" and "to the containment of costs for skilled and intermediate nursing care for this population." (Stipulated Fact No. 43; Stipulated Exhibit No. 3)

Unavailability of Community Mental Health Programming Resources and Services for Individuals Designated as Mentally Ill

The existing state programs for mentally ill persons do not provide home health care services, personal care services, respite care services, non-medical or non-treatment transportation services, environmental home modification and electronic monitoring services, or homemaker services. (Stipulated Fact No. 54) It has been stipulated that there is no alternative program in the State of Colorado which provides for Duc Van Le and the class of mentally ill persons he represents the same HCBS program services which are currently being provided to elderly, blind and physically disabled persons. (Stipulated Fact No. 45)

The replacement clinic option program for HCBS for mentally ill persons, funded in part with federal Medicaid funds, is not available to persons like Le who fall into the 300 percent category of persons who would have been financially eligible for the HCBS program services.

Le's Qualifications for HCBS

On the basis that Le requires 24-hour/five days a week of skilled nursing supervised care, an application was taken by the Denver Department of Social Services in August, 1988 for HCBS entitlement. (Stipulated Fact No. 11) On August 18, 1988, the Colorado Foundation for Medical Care ("CFMC") conducted an admission review based upon the psychiatric diagnosis of schizophrenia. (Stipulated Fact No. 12)

The call-in assessment by Carla Montez, medical coordinator for Atlantis Community, Inc., was scored by the CFMC as follows: five points were assessed in the area of "Contact with Reality" on the basis of visual and audio hallucinations which were not necessarily harmful to him but required constant intervention by the home health care provider or other person. Five points were assessed in the area of "Behavior" based upon a history of noncompliance with medication and potential harm to self, verbal abuse, and sometimes disruptive behavior. Two points were assessed in the area of "Communication" based upon learning skills of English. As indicated above, Le does not speak English and he has a speech impediment in his native tongue. One point was assessed in the area of "Bathing" and one point was assessed in "Dressing" based upon the requirement of verbal assistance needed. Two points were assessed in the area of "Supervision" based upon the mental health ~~care~~ counseling required weekly and monitoring of medications twice daily. Five points were assessed in the area of "Living Skills" with deficits in cooking, shopping, managing money, cleaning house, and laundry. The total point score of 21 points was determined by the CFMC to be sufficient to meet the threshold requirement for Medicaid reimbursement for HCBS services. (Stipulated Fact No. 13)

At the time of this assessment, Le qualified financially for HCBS, but was not otherwise eligible for Medicaid services. Because he receives Social Security Disability of $374 monthly, his income is $24 higher than the need standard for the ordinary

Medicaid program. However, Le does qualify financially for the HCBS program under the 300% rule since his income is less than 300% of the Supplemental Security Income Need Standard. (Stipulated Fact No. 14)

Petitioners' Discriminatory Practices Against Individuals Designated as Mentally Ill

Despite the fact that Le met both the financial screening and medical guidelines for the HCBS program, the CFMC, under Colorado regulations, was required to make a referral of Le's case to the CDSS for target group designation based upon psychiatric diagnosis. (Stipulated Fact No. 15) The CDSS subsequently determined that Duc Van Le was in the target group of mentally ill as a result of his psychiatric diagnosis and, therefore, denied Medicaid reimbursement for HCBS for Le. (Stipulated Fact No. 16)

A timely appeal of the CDSS' decision was taken on behalf of Le. (Stipulated Fact No. 18)

An administrative hearing was held on October 18, 1988 and a state Administrative Law Judge ruled that, although Le qualified for HCBS, there is no availability for Medicaid reimbursement for HCBS for individuals designated as mentally ill. (Stipulated Fact No. 19) A timely action for judicial review of the Administrative Law Judge's decision was filed in the trial court below. (Stipulated Fact No. 20)

Of critical significance here, if Le's need for services had been based on physical disability instead of mental disability, he would have been granted HCBS. (Stipulated Fact No. 17) It has been stipulated that, even though Le, and the class of persons he

represents,[3] meet all of the financial and medical qualifications for HCBS services, they have been denied these services "solely on the basis that their primary diagnosis is mental illness." (Stipulated Fact No. 46, emphasis added)

The current position of the U.S. Department of Health and Human Services regarding the availability of Section 1915(c) HCBS waiver programs for the mentally ill is reflected in the May 17, 1990 letter to Congresswoman Patricia Schroeder from Gail R. Wilensky, Administrator of the Health Care Financing Administration of the U.S. Department of Health and Human Services. (Stipulated Fact No. 52; Stipulated Exhibit No. 6)

The Petition for Writ of Certiorari altogether fails to mention that new state legislation has been introduced to re-authorize a Colorado HCBS program for mentally ill persons, and the State of Colorado, contrary to its previous litigation position, has very recently applied to the federal government to operate such a program, based upon a demonstration that HCBS does, in fact, meet the cost effectiveness criteria of the HCBS program. Copies of the pertinent state senate bill and waiver application are reproduced, respectively, in Exhibits C and D hereto.

---

[3] The State of Colorado has denied HCBS services for at least 28 mentally ill individuals like Le since March 1987. (Stipulated Fact No. 47) Additional mentally ill individuals like Le have also been denied HCBS services, although the Petitioners do not have records of such denials. (Stipulated Fact No. 48) All of these individuals were denied HCBS services "solely on the basis that their primary diagnosis is mental illness." (Stipulated Fact No. 48, emphasis added) Moreover, the termination of the HCBS/mentally ill program in 1985 has deterred other mentally ill individuals from applying for HCBS benefits. (Stipulated Fact No. 49) It has been stipulated that 635 individuals, whose primary diagnosis is mental illness, currently reside in Medicaid certified nursing homes in Colorado. (Stipulated Fact No. 50)

Supplementary Factual Findings of the Trial Court Below

In addition, the trial court made 13 supplementary findings, all of which are abundantly supported by the record:

1. Personal care services, homemaker services, medication monitoring in the home, and non-medical transportation, which are services currently provided under the HCBS program for the elderly, blind and physically disabled, are essential services which are necessary to maintain Le, and the class of persons he represents, in stable condition in the community, and to avoid institutionalization of such persons in hospitals and nursing homes.

2. No public or private agency currently has a program to provide these essential services to Le, or the class of persons he represents, although such services are provided by CDSS to elderly, blind and physically disabled adults whose incomes and medical needs are virtually identical with those of Le and the class of persons he represents.

3. Without HCBS, Le and the class of persons he represents will continue to experience the revolving door syndrome of hospitalization, nursing home placement, placement in the community, de-stabilization and re-hospitalization. Thus, the availability of HCBS is an essential ingredient of normal living patterns for a substantial number of persons who are mentally ill. The failure to provide such services operates to exclude persons who are mentally ill from living in the community, and to return them into more restrictive environments.

4. The mental health services currently provided through the Mental Health Corporation of Denver ("MHCD") and other community mental health centers are not sufficient by themselves to avoid the revolving door of re-institutionalization of chronically mentally ill persons. As an example, there is currently a 200-person waiting list for case management services in the MHCD alone. Even under optimal conditions, case managers, with the existing resources, could only spend, on average, slightly more than one hour per week with chronically mentally ill clients. Such case management services, alone, cannot provide the community supports necessary to avoid re-institutionalization of plaintiff and other mentally ill persons class members.

5. Although the State of Colorado claims that the federal government will not fund a HCBS waiver for mentally ill persons, the state has not, since 1985, applied for such a waiver, has not requested in writing any assistance from the federal government to develop a waiver which would be acceptable under the existing regulations, and has not made any attempts to correct its rejected 1985 waiver application or to challenge the rejection of that waiver application in 1985.

6. The cost burden to the State of Colorado of providing HCBS services for the mentally ill is insignificant in light of the benefits to Le and the class of persons he represents, and the federal government's contribution of between 50% and 75% of the cost. The provision of such services would prevent unnecessary hospitalizations at a cost of $400.00 per day, as compared to the $46.00 per day average cost of HCBS services.

7. There are currently approximately 300 persons in nursing homes in the Denver metropolitan area alone who have been designated as mentally ill.

8. Many of these persons could live in the community if community supports provided through the HCBS program were made available to them.

9. In addition, there are substantial numbers of class members who are currently residing in the community, either in substandard boarding homes or homeless shelters, who would benefit from home and community based services identical to those that are currently provided to the elderly, blind and physically disabled.

10. Despite these facts, the State of Colorado, through DOI and CDSS, has simply failed to exercise reasonable diligence to seek out federal financial assistance, which is currently available, to provide these home and community based services to Le and the class of persons he represents.

11. As Le, and the class of persons he represents, meet all of the medical and financial qualifications for the HCBS program currently operated by the State of Colorado, other than the fact that they are mentally ill, they are "otherwise qualified" handicapped persons under § 504 of the Rehabilitation Act of 1973.

12. Le, and the class of persons he represents, require the very same home and community based services, which the State of Colorado currently makes available to the elderly, blind and physically disabled. Le, and the

class of persons he represents, are deprived of these services "solely by reason of the nature of their disability."

13. The State of Colorado is currently underspending its authorized funding for home and community based services for the elderly, blind and physically disabled; therefore, there is sufficient funding within the HCBS program to accommodate the provision of home and community based services to Le and the class of persons he represents.

None of these findings has been challenged as being factually erroneous by Petitioners.

Misstatements and Omissions by Petitioners

Instead of basing their arguments on the factual background that was established in the trial court below, Petitioners in their Statement of the Case attempt to present facts which are outside of, and contrary to the Stipulated Facts and the trial court's supplementary factual findings. For example, the Petition misstates as "fact" that there are other publicly funded programs in the State of Colorado adequate to assist Le, and the class of persons he represents, to live outside of institutional settings, such as the Adult Foster Care Program, home care allowances, and Medicaid rehabilitation option services. (Petition, p. 6) This statement is directly refuted by the evidence presented at trial and by the trial court's factual findings above.[4]

---

[4] During trial, two witnesses -- Catherine Pring, the Director of Adult Services for the Denver Department of Social Services, and Rose Kotlar, the Director of Outpatient Services for the Mental Health Corporation of Denver -- gave testimony which refuted the sufficiency of the above-mentioned programs to provide the essential supportive services to meet the needs of Le and the class of persons he represents. According to Ms. Pring, the Adult Foster Care Program is limited to 50 persons because of insufficient appropriations. Ms. Pring also testified that the

Similarly, the Petition for Writ of Certiorari misstates that the programs operated by community mental health centers, such as the Mental Health Corporation of Denver, are adequate to assist Le, and the class of persons he represents to live outside of institutional settings. (Petition, p. 6) This statement, too, is directly refuted by the evidence presented at trial,[5] by the judicially recognized deficiencies in Colorado's community mental health services system,[6] and by the trial court's factual findings above. (See, in particular, the trial court's supplementary factual finding No. 4)

In addition, the Petition for Writ of Certiorari misstates that, because Medicaid does not pay the cost of treatment for mentally ill persons in an institution for mental disease, it is difficult to demonstrate that HCBS for mentally ill persons meet the cost effectiveness criteria of the HCBS program. (Petition, p. 6) This is not "fact" but rather an argument which is based upon an incorrect comparison. Just as the cost effectiveness of HCBS for elderly, blind, and physically disabled persons is determined

---

State of Colorado had just instituted a new screening device which would disqualify mentally ill persons from receiving home care allowances. Further, Bruce Berger, Deputy Director of the Colorado Division of Mental Health, admitted in his trial testimony that Medicaid rehabilitation option services are not available to Le or the class of persons he represents.

[5] For example, Rose Kotlar testified at trial that the Mental Health Corporation of Denver has only a "very limited capacity to almost non-existent capacity to provide the home and community based services necessary to maintain mentally ill persons in the community."

[6] The Colorado Supreme Court in 1988 found the State of Colorado's community mental health services system to be so deficient in providing the required levels of care as to violate the Colorado Care and Treatment of the Mentally Ill Act. See Goebel v. Colorado Dept. of Institutions, 764 P.2d 785 (Colo. 1988).

by comparing the cost of such services to the cost of providing care to such persons in nursing homes, so too must the cost effectiveness of providing HCBS for mentally ill persons be determined.[7] As Respondents have sought the very same services currently provided under the HCBS program to the elderly, blind and physically disabled, these services -- if they are cost effective for other disabled persons -- will also be cost effective for mentally ill persons.

Most importantly, Petitioners continue to distort and ignore their judicially binding stipulations that Le, and the class of persons he represents, are identically situated with respect to the purposes of the HCBS program, such services are "essential" to them, and they are being denied access solely because they have the "wrong "kind of disability -- mental illness. These binding stipulations fatally infect Petitioners entire argument.

SUMMARY OF ARGUMENT

I. There are no special or important reasons for certiorari review of the opinions below, which have no effect as legal precedent in any court.

II. The trial court's ruling that the Petitioners violated the requirements of § 504 of the Rehabilitation Act of 1973, as amended, and 45 C.F.R. §84.4(b), is correct and not in conflict

---

[7] As Rose Kotlar pointed out in her testimony, there are, in Denver alone, over 300 mentally ill persons in nursing homes, and not in institutions for mental disease. Medicaid pays the nursing home costs for these persons. Therefore, the cost of HCBS services to these persons must be compared to the cost of nursing home care, not some hypothetical "no cost" institution for mental disease.

with any applicable decision of this Court or of a United States Court of Appeals.

III. The trial court's equal protection analysis is correct and not in conflict with any applicable decision of this Court or of a United States Court of Appeals.

ARGUMENT

I. There is no special or important reason for certiorari review of the opinions below, which have no effect as legal precedent in any court.

Under Colorado law, judgments of an equally divided state supreme court, like the unpublished opinions of lower state courts, are not followed as precedent. Rule 35(e), Colorado Appellate Rules; People ex rel. Walker v. Stapleton, 79 Colo. 629, 630, 247 P. 1062 (1926). Thus, the affirmance of the trial court's unpublished Decision and Order in this case, by operation of law because of an equally divided state supreme court, is virtually of no effect as legal precedent in any court.

In addition, as noted earlier, the State of Colorado is presently pursuing a waiver in order to operate a HCBS program for mentally ill persons, in addition to physically disabled, developmentally disabled, and elderly adults. (Appendix D) It is anticipated that a HCBS program for mentally ill persons will soon become a reality in the State of Colorado, and obviate the need for any intervention by this Court. This case is well on its way to being all but moot and lacking in any real case or controversy.

Moreover, as a result of the passage of the Americans With Disabilities Act, the legal terrain and pathways for reaching

decisions in disability discrimination cases -- including cases involving the allocation of health care benefits such as the present case -- have been re-charted, leveled, and made more accessible to disabled persons. In effect, § 504 of the Rehabilitation Act of 1973 has been supplanted by the Americans With Disabilities Act of 1990 ("ADA"). Consequently, a Supreme Court opinion on the § 504 issue in this case is likely to be largely of interest only to legal historians. Given the State's dominating impermissible admission that Le and the class are excluded from HCBS solely because of their mental illness, there simply is no important legal issue now before this Court. Such discrimination has been outlawed by the ADA.

Given the lack of precedential value in any of the opinions below, the State of Colorado's pursuit of a waiver to operate a HCBS program for mentally ill persons, which is expected to soon eliminate the state's exclusionary treatment of the mentally ill in the allotment of HCBS benefits, and the passage and effect of the ADA, review of this case on a writ of certiorari would only serve to address an academic or episodic issue. Accordingly, review should be denied in this case.

II. The trial court's ruling that Petitioners violated the requirements of § 504 of the Rehabilitation Act of 1973, as amended, and 45 C.F.R. §84.4(b), is correct and not in conflict with any applicable decision of a United States court of appeals or of this Court.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988), provides in relevant part:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by

> reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance . . .[5]

In Pushkin v. Regents of University of Colorado, 658 F.2d 1372 (10th Cir. 1981), the Tenth Circuit stated:

> The standards for determining the merits of the case under Section 504 are contained in the statute. First, the statute provides that the individual in question must be an "otherwise qualified handicapped individual"; second, the statute provides that the qualified handicapped individual may not be denied admission to any program or activity or denied the benefits of any program or activity receiving federal financial assistance "solely" on the basis of handicap.

The Stipulated Facts and additional findings of fact made by the trial court fully establish the required elements of § 504. Specifically, Petitioners have stipulated that:

- Respondents are protected handicapped individuals within the meaning of 29 U.S.C. § 794 and its implementing regulations. (Stipulated Fact No. 55)

- The HCBS program operated by Petitioners receives federal financial assistance. (Stipulated Fact No. 56) The HCBS program is jointly funded by the federal government and states, with the federal government paying between 50% and 75% of the cost under the Medicaid Title XIX program. (Stipulated Fact No. 28)

- Home and Community Based Service programs are statutorily authorized under § 1915(c) of the Social Security Act, 42 U.S.C. 1396n(c), for the elderly, blind and physically disabled, mentally ill and developmentally disabled persons to prevent the unnecessary institutionalization of such persons, to provide more appropriate community based services for these populations, and to contain the costs of long-term nursing care. (Stipulated Fact Nos. 26, 27)

---

[5] The implementing regulations of § 504, 45 C.F.R. § 84.4 (1991), are set forth infra, at pp. 2-3.

- Currently, Petitioners provide elderly, blind, and physically disabled persons the following HCBS benefits:

  > Home health services; personal care services; respite care services; nonmedical transportation services; environmental home modification and electronic monitoring services; case management services; homemaker services; and adult day care services.

  (Stipulated Fact No. 40)

- These same services would be of great benefit to petitioners in the class of mentally ill persons he represents. Indeed, according to the Executive Director of the Department of Social Services, such services are "essential to the care and treatment of the long-term mentally ill population" and "to the containment of costs for skilled and intermediate nursing care for this population". (Stipulated Fact No. 43)

- Even though Respondents meet all the financial and medical screens for HCBS program services, they have been and are being denied these services solely on the basis that their primary diagnosis is mental illness. (Stipulated Fact Nos. 46, 48)

- There is no alternative state program which provides for Respondents the HCBS benefits that are currently being provided to elderly, blind and physically disabled persons. (Stipulated Fact Nos. 45, 54)

In addition, the trial court found that:

- As Respondents meet all the medical and financial qualifications of the HCBS program currently operated by Petitioners, other than the fact that they are mentally ill, they are "otherwise qualified" handicapped persons under §504 of the Rehabilitation Act of 1973. (Trial court's supplementary factual finding No. 11)

- Respondents require the very same home and community based services which Petitioners currently makes available to the elderly, blind and physically disabled, and that Respondents are deprived of these services "<u>solely</u> by reason of nature of their disability." (Trial court's supplementary factual finding No. 12)

- By failing to provide HCBS benefits to mentally ill persons, the State of Colorado has underdeveloped a community based services system for those suffering from mental illness, which perpetrates past discrimination

> against such persons. Such discrimination clearly violates Respondents' rights under § 504. (Trial court's supplementary factual finding No. 13)

These stipulations and findings of fact demonstrate that Respondents are disabled individuals who meet all the required financial and medical qualifications for the HCBS program. It is undisputed that Respondents need and could benefit from exactly the same HCBS services currently being provided to elderly, blind and physically disabled persons. Petitioners admit that Respondents have been and are being denied these services solely on the basis of their handicap, i.e., that they are mentally ill.

It simply cannot be over-emphasized that this Court's important national services are not appropriately invoked in this case, where having the wrong kind of disability, but an equal need for the services, is the sole basis for discriminating against Respondents.

In determining whether the requirements of § 504 are met, this Court has mandated that trial courts must balance "the statutory rights of the handicapped to be integrated into society and the legitimate interest of federal grantees in preserving the integrity of their programs." Alexander v. Choate, 469 U.S. 287, 301, 105 S. Ct. 712, 720 (1984). This balancing test requires that:

> an otherwise handicapped individual must be provided with meaningful access to the benefit the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies other qualified handicapped individuals the meaningful access to which they are entitled; to insure meaningful access, reasonable accommodation of the grantee's program or benefits may have to be required.

Id., 105 S.Ct. at 721.

Discriminatory practices in the allocation of federally funded benefits, solely on the basis of handicap, have often been held to violate § 504 of the Rehabilitation Act of 1973. See, e.g., Homeward Bound, Inc. v. Hissom Memorial Center, No. 85-C-437-E (N.D. Okla. July 24, 1987 [available on WESTLAW, 1987 WL 27104]) (refusal to apply for HCBS benefits for mentally retarded violated § 504); Sites v. McKenzie, 423 F.Supp 1190 (N.D. Va. 1976) (denial of vocational rehabilitation benefits on basis of mental illness violates § 504); Lynch v. Maher, 507 F.Supp. 1268 (D. Conn. 1981) (denial of homecare services on basis of handicap violates § 504); Goebel v. Colorado Dept. of Institutions, 764 P.2d 785, 804 (Colo. 1988) (failure to provide more severely disabled mentally ill persons access to services constitutes discrimination in violation of § 504).

Section 1915(c) of the Social Security Act, 42 U.S.C. 1396n(c), establishes the HCBS waiver program for all:

> . . . individuals with respect to whom there is a determination that but for the provision of such services, these individuals would require the level of care provided in a skilled nursing facility or intermediate care facility.

There is no language in § 1915(c) of the Social Security Act which encourages or supports the type of purposeful unequal treatment admittedly practiced in this case. The State of Colorado, through its refusal to re-apply for HCBS benefits for the mentally ill, deprives qualified handicapped individuals of meaningful access to the same benefits provided to elderly, blind, and physically

disabled persons with identical incomes and medical needs. Such action clearly violates § 504.

This conclusion is fortified by 45 C.F.R. 84.4, which interprets § 504 of the Rehabilitation Act to prohibit a recipient of federal funds from denying, on the basis of handicap, any qualified person the "opportunity to participate in or benefit from" program services provided by the recipient.

Petitioners' reliance on Knutzen v. Eben Ezer Lutheran Housing Center, 815 F.2d 1343 (10th Cir. 1987), to support their challenge to the trial court's ruling under Section 504 is misplaced. In Knutzen v. Eben Ezer Lutheran Housing Center, the Tenth Circuit ruled that admission to a housing project -- financed under § 202 of the National Housing Act, 12 U.S.C. § 17010, to provide housing for the elderly or handicapped -- need not be extended to the mentally impaired and developmentally disabled. The National Housing Act, at issue in Knutzen, contained express language "which permits sponsorship of only one of the four groups covered." Id., 815 F.2d at 1353. The Tenth Circuit concluded that the housing applicants did not establish a "prima facie case under § 504 because they were not excluded solely because of their handicaps." Id., 815 F.2d at 1353. In this case, however, Petitioners have admitted that Le, and the class of persons he represents, have been and are being denied benefits solely because of the nature of their handicaps.

Moreover, the Knutzen court found that the housing applicants were not "otherwise qualified" as required by § 504. Id., 815 F.2d

at 1352-53. Here, in contrast, Respondents seek admission to a program for which they are "otherwise qualified." HCBS is available for the elderly, blind, and disabled. The Medicaid statute -- 42 U.S.C. §1396 -- does not limit access to HCBS benefits to the physically disabled only. The state's attempted limitation of HCBS to the physically disabled is precisely the sort of discrimination that violates § 504.

The Knutzen court also relied upon the express language of Section 202, which indicates that Congress intended that a housing sponsor could lawfully provide housing services to elderly and physically disabled tenants while excluding mentally disabled persons. Section 1915(c) of the Social Security Act, 42 U.S.C. 1396n(c), however, does not evince any intent to authorize states to discriminate in the allocation of federally funded HCBS benefits.

Moreover, the policy considerations underlying the Section 202 housing program are very different than the policy considerations for the HCBS program. In the Section 202 housing program, the mixture of mentally disabled persons with frail elderly persons often creates a problem of residential management. However, as the HCBS program is specifically directed toward keeping beneficiaries in the community in their separate homes and apartments, the residential management problems which could potentially arise due to the mixing of various disabled populations in housing projects are not an issue.

Petitioners' reliance upon Beckwith v. Kizer, 912 F.2d 1139 (9th Cir. 1990) is equally misplaced. In response to an equal protection challenge, the Beckwith court upheld a waiver program that limited HCBS benefits to those persons with respect to whom home care would allow to leave an institutional setting and return to an independent living situation. The Beckwith court carefully pointed out that the case does not concern handicap discrimination. As the court noted:

> In this situation, the State of California did not choose to limit the target group to those suffering from any particular disease or disability. It chose to define its target class in terms of the need for long-term acute hospital-level care and to look for hospitalization as a criteria.

Id., 912 F.2d at 1143, emphasis added. The court went on to determine that the purpose of HCBS is to prevent institutionalization and that the state's definition of a target class in terms of need for assistance to end hospitalization was not irrational. However, it is very important to note that the Beckwith court also noted that it was not deciding whether conditioning benefits upon hospitalization "would always be rationally related to a §1396n(c) waiver, regardless of the nature of the targeted class." Id., 912 F.2d at 1144.

The Beckwith court also did not involve a § 504 claim of discrimination on the basis of type of handicap. There was no ruling that discrimination in the HCBS waiver program solely on the basis of a person's handicap would permissible under § 504 of the Rehabilitation Act of 1973. Thus, the Beckwith court was not

required to harmonize and give effect to both the requirements of § 504 of the Rehabilitation Act of 1973 and §1915(c) of the Social Security Act.

Petitioners' reliance on Doe v. Colautti, 492 F.2d 704 (3rd Cir. 1979), is likewise misplaced. In Doe v. Colautti, the plaintiffs sought a special service which was focused solely on the needs of persons with psychiatric illness. Respondents here seek no specialized services focused directly on their particular handicap, i.e. mental illness, but exactly the same services currently being provided to other disabled persons.

Therefore, the trial court's ruling that Petitioners, by their intentionally discriminatory practices, violated the requirements of § 504 of the Rehabilitation Act of 1973 and 45 C.F.R. §84.4(b), is correct and not in conflict with any applicable decision of this Court or of a United States Court of Appeals. Accordingly, review on certiorari should not be granted in this case.

As the trial court's § 504 ruling is itself sufficient to sustain the injunctive order granted by the trial court, there is no necessity to consider the trial court's constitutional equal protection analysis, which provides an alternate ground for the injunctive order. This Court has long taught that it will not reach out to interpret the Constitution where a dispositive statutory interpretation will suffice to fully dispose of a case.

III. The trial court's equal protection analysis is correct and not in conflict with any applicable decision of this Court or of a United States Court of Appeals.

The trial court's Decision and Order is not the wild-eyed novel decision of Petitioners' imagination. While it is true that, in light of the legislative findings in the Americans with Disabilities Act of 1990, the trial court also held that the mentally ill are a suspect classification for purposes of its equal protection analysis, this holding was in the alternative to the district court's definitive holding that Petitioners lacked a rational basis for refusing to provide HCBS benefits for the mentally ill.

At the heart of the trial court's equal protection analysis are the principles and teachings of City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), and a careful rejection of each of the Petitioners' proffered rationalizations for their denial of access to HCBS services solely because Respondents have the "wrong" kind of disability.

Petitioners have urged review in this case because of the trial court's reliance on the ADA legislative findings section to support its determination of a suspect classification, while greatly down-playing how the trial court principally determined the equal protection issue by following a rational basis approach. Unfairly hoping to arouse this Court's interest in this more novel question, Petitioners seek to induce this Court to grant certiorari on the erroneous contention that there was not a solid and

principled approach based on the existing equal protection principles embraced by this Court. Review by this most important Court cannot be justified merely because the trial court also agreed with Respondents' suspect classification argument.

The binding stipulations and findings of fact in the trial court below fully support the ruling that the Petitioners' denial of HCBS benefits to the mentally ill, solely because of the nature of their disability, and not because of any legitimate non-discriminatory state interest, violates Respondents' rights to equal protection. Once again, it has been stipulated and established here that:

- Section 1915(c) of the Social Security Act authorizes HCBS benefits for the elderly, blind, physically disabled, mentally ill and developmentally disabled persons. (Stipulated Fact No. 26).

- The purposes of the HCBS programs are to prevent unnecessary institutionalization of the above populations, to contain the cost of long-term nursing home care, and to provide more appropriate community based services for these populations. (Stipulated Fact No. 27)

- The HCBS waiver programs "are jointly funded by the federal government and states, with the federal government paying between 50% and 75% of the cost under the Medicaid Title XIX program." (Stipulated Fact No. 28)

- The State of Colorado has not operated or sought to operate an HCBS waiver program for the mentally ill since 1985, while it has continued to operate such programs for the elderly, blind and physically disabled and for developmentally disabled persons. (Stipulated Fact Nos. 37, 38)

- Since 1985, the State of Colorado has provided, and is currently providing, HCBS program services for the elderly, blind and physically disabled, which include home health care services, personal care services, respite care services, nonmedical transportation

services, environmental home modification and electronic monitoring services, case management services, homemaker services, and adult day care services. (Stipulated Fact No. 40)

- These exact same services would be "of great benefit to Le and the class of mentally ill persons he represents" and that they are "essential to the care and treatment of the long-term mentally ill population and to the containment of costs for nursing home skilled and intermediate care for this population." (Stipulated Fact No. 43)

- The State of Colorado, "under Section 1915(c) could submit (and, as shown in Appendix D, now has submitted) a waiver request for the mentally ill population under which it could provide the very same services that are currently being provided to elderly, blind and physically disabled persons." (Stipulated Fact No. 44)

- There is no alternative state program which provides for Duc Van Le and the class of mentally ill persons he represents the same HCBS program services which are currently being provided to elderly, blind and physically disabled persons." (Stipulated fact number 45)

Having stipulated before trial to all these essential facts, Petitioners attempted in the trial court to justify their failure to pursue a HCBS waiver for mentally ill persons on the basis of the following claimed rationalizations:

1. Mentally ill persons do not always need the same services and cannot be treated the same as physically disabled people;

2. The State of Colorado should be able to provide services for which federal financial assistance is available, while not undertaking similar services in the absence of federal funding; and

3. The State of Colorado should be able to determine the appropriate allocation of scarce resources for public welfare benefits.

See the trial court's Conclusions of Law, reprinted in Appendix A to the Petition for Writ of Certiorari, p. A-9. Petitioners' own stipulations, along with the exhibits to which the stipulations

refer and the additional findings made by the trial court, defeat each of these claims. With respect to Petitioners' first claim, that mentally ill individuals have vastly different needs than physically disabled persons, Petitioners have stipulated that exactly the same HCBS services currently provided to the elderly, blind and physically disabled are "essential" and "would be of great benefit to Duc Van Le and the class of mentally ill persons he represents." (Stipulated Fact No. 43) Further, the trial court found that Respondents need the same home and community based services which are currently made available to the elderly, blind and physically disabled. (Trial court's supplementary factual finding No. 12) In relation to the declared purpose of the HCBS program, which is principally to provide all disabled individuals with home and community based services necessary to maintain them in their own homes, thereby avoiding unnecessary institutionalization, the needs of elderly, blind and physically disabled persons for HCBS benefits are no different than the needs of mentally ill persons. §1915(c) of the Social Security Act includes all such disabled persons including the mentally ill and does not in any way divide them by disability type.

With respect to the second claim, that federal funding of HCBS for mentally ill persons is not obtainable, Exhibit 5 to the Stipulated Facts, a May 17, 1990 letter from the director of the Health Care Financing Administration ("HCFA") to Congresswoman Patricia Schroeder, states unequivocally that federal financial assistance is available for HCBS program services for the mentally

ill, just as it is available for HCBS program services for the elderly, blind and physically disabled. This letter from HCFA also states that the U.S. Department of Health and Human Services "applies the same standards to waivers for the mentally ill as it does for all other requests for waivers." Accepting the truth of this fact even now Petitioner has just filed for such a waiver. See Appendix D.

There is no factual basis to support Petitioners' third claim, that they should be allowed to provide HCBS program services to the elderly, blind and physically disabled while denying these services to mentally ill persons on the alleged ground of "scarce public dollars". Petitioners have stipulated that HCBS services are essential, not only to "the care and treatment" of such persons, but also to "the containment of costs for skilled and intermediate care for this population." (Stipulated Fact No. 43) Therefore, federal funds are equally available for HCBS programs for the mentally ill as for HCBS programs for the elderly, blind and physically disabled. Moreover, Petitioners have stipulated that the federal government would pay between 50% and 75% of the cost of such programs. (Stipulated Fact No. 28) Petitioners' claim of "scarce public dollars" is also refuted by the fact, as found by the trial court, that the State of Colorado has been underspending appropriated funds for the HCBS program. (Trial court's supplementary factual finding No. 13)

The Trial Court Below Principally Relied on this Court's Opinion in City of Cleburne v. Cleburne Living Center, Inc.

In City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 450 (1985), this Court held that there was no rational basis for requiring a special use permit for group homes for the mentally retarded. The standard of review applied by this Court in Cleburne requires that there be a demonstrably rational basis in fact -- rather than any "reasonably conceivable" basis in fact -- for the governmental action; that there be a demonstrably rational nexus between the classification and a legitimate governmental purpose; and the adverse impact on the mentally retarded be no more than an incidental burden on -- not a total deprivation of -- essential services. Id., 473 U.S. at 458.

The standard of review applied in Cleburne, with respect to classifications involving the mentally retarded, is applicable to the mentally ill. Id., 473 U.S. at 445-46 (mentally ill are similarly situated to mentally retarded for equal protection purposes); Doe v. Cowherd, 770 F.Supp. 354, 358 (W.D. Ky. 1991).

There was not a demonstrably rational basis in fact for Petitioners' refusal since 1985 to reapply for a HCBS program to benefit mentally ill persons. The federal government's denial of the 1985 waiver application left open the possibility of approval (now finally being pursued) upon the State of Colorado's full compliance with regulatory requirements. Nor was there a demonstrably rational nexus between the classification and a legitimate governmental purpose.

Moreover, excluding the class of the mentally ill from access to HCBS benefits does not achieve any articulable governmental purpose that is legitimate. The provision of HCBS benefits for the mentally ill could save the State of Colorado untold millions of dollars in hospital and nursing home expenses by preventing mentally ill persons from deteriorating to the point where, unable to assume responsibility for day-to-day self-care, they would be institutionalized or live on the streets.

In addition, the failure to provide HCBS is a total deprivation of admittedly essential services for the mentally ill. The adverse burden cannot be termed "incidental." Cleburne, 473 U.S. at 446. The State of Colorado's failure to re-apply for HCBS for mentally ill persons totally deprives Le, and the class of persons he represents, of benefits that the state has made available to other groups of disabled persons in need of similar services. Petitioners' termination of HCBS benefits for the mentally ill is discrimination that the equal protection clause, as interpreted in Cleburne, is intended to prohibit.

It is Unnecessary for this Court to Decide the Impact of the ADA Legislative Findings on Judicial Interpretation of the Equal Protection Clause

Although not necessary to the result reached in this case, the trial court, on the basis of the legislative findings section of the ADA enacted by Congress and signed into law by former President George Bush on July 26, 1990, determined that mental illness constitutes a suspect classification for purposes of equal protection analysis. Congress adopted the legislative findings of

the ADA, set forth in 42 U.S.C. § 12101(7), after this Court indicated that the rational basis test applied in Cleburne would be applicable to classifications that discriminated against the mentally ill, and just a short time before the trial court rendered its decision in this case. The legislative findings are a Congressional determination that the mentally ill comprise a suspect class for purposes of equal protection analysis. Congress found that individuals with disabilities are a:

> discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

In the opinions of this Court, a governmental action or classification is considered suspect if it singles out religious, racial or other discrete and insular minorities for unequal treatment. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976); United States v. Carolene Products Co., 304 U.S. 144, 152-53, n.4 (1938). A suspect class is one saddled with such disabilities, subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. Murgia, 427 U.S. at 313; San Antonio School District v. Rodriguez, 411 U.S. 1, 28 (1973). Members of a suspect class may be subjected to disabilities due to

"stereotyped characteristics not truly indicative of their abilities." Murgia, 427 U.S. at 313.

The legislative findings in the ADA, which were enacted shortly before the trial court rendered its decision, duly influenced the trial court in alternatively deciding the appropriate standards of judicial scrutiny to be applied in this case. This Court has upheld the premise that Congressional findings may be binding on the courts. South Carolina v. Katzenbach, 383 U.S. 301 (1966) (applying findings in Voting Rights Act of 1965). Further, although there may appear to be some authority to the contrary, courts are required to apply the law in effect at the time they render their decisions. Bradley v. Richmond School Board, 416 U.S. 696, 711 (1974). The trial court's analytical reliance on the legislative findings to support its alternative determination that the mentally ill are a suspect classification for purposes of its equal protection analysis, although unprecedented, is also well grounded in the jurisprudence of this Court.

In the opinions of this Court, equal protection analysis requires strict scrutiny review if a government action or classification operates to the disadvantage of a suspect class or adversely affects the exercise of a fundamental right. Murgia, 427 U.S. at 312. Strict scrutiny requires that the government action or classification further a compelling governmental interest. Cleburne, 473 U.S. at 440.

The trial court, after first determining that the State of Colorado's denial of HCBS benefits for the mentally ill irrationally operated to the disadvantage of a suspect class, went on to alternatively determine that Petitioners also showed no compelling governmental interest to support the unequal and discriminatory treatment of Le and the class of persons he represents.

Petitioners did not describe a legitimate state interest -- let alone a compelling state interest -- served by their refusal to provide HCBS benefits to mentally ill persons. Thus, for the same reasons that the State of Colorado failed to demonstrate a legitimate governmental interest supporting its refusal to provide HCBS benefits to the Respondents, solely because of their mental illness, the state also failed to establish the more rigorous compelling governmental interest. Either way, Petitioners' termination of HCBS benefits for the mentally ill, under the facts presented in this case, is an unconstitutional denial of equal protection.

The trial court's conclusion that there is no legitimate, significant or compelling governmental reason for the State of Colorado's refusal to provide HCBS benefits to Respondents, solely on the basis of their mental illness, is correct, and not in conflict with any applicable decision of this Court or of a United States Court of Appeals.

The alternative suspect class holding of the trial court is an unpublished opinion of no precedential value. This nationally

significant issue should await development by future opinions of the United States Courts of Appeal and state supreme courts before being reviewed and finally determined by this Court. Accordingly, review on certiorari should not be granted in this case.

CONCLUSION

The Petitioners, by depriving qualified mentally ill individuals of meaningful access to the same HCBS benefits provided to elderly, blind, and physically disabled persons, are violating Respondents' rights under §504 of the Rehabilitation Act of 1973 and 45 C.F.R. 84.4, and their rights to equal protection under the Fourteenth Amendment to the Constitution. The trial court did not err in declaring such discrimination to be unlawful and ordering appropriate injunctive relief.

As the Arizona Supreme Court noted in Arnold v. Dep't. of Health Services, 775 P.2d 521, 537 (Ariz. 1989) (quoting Hubert H. Humphrey),

> "The moral test of government is how it treats those who are in the dawn of life, the children; those who are in the twilight of life, the aged; and those who are in the shadows of life, the sick, the needy, and the handicapped."

The State of Colorado's denial of HCBS benefits to low income mentally ill persons who qualify for skilled or intermediate nursing home care under the Social Security Act, 42 U.S.C. §1396 et seq. (1988),

> "fosters the perpetuation of a substantial underclass of mentally ill citizens whose continued state of dependency is caused by governmental indifference to or neglect of basic human needs."

(Justice Joseph Quinn's dissenting opinion, set forth in Appendix B to the Petition for Writ of Certiorari, p. B-31)

The central fact in this case is that the State of Colorado has stipulated that it has determined to exclude the otherwise qualified mentally ill population from benefits they admittedly direly need solely because they have the wrong kind of disability. Given this binding factual admission, this case is not worthy of certiorari review.

Respectfully submitted,

LAW OFFICES OF JOHN ROBERT HOLLAND,
A PROFESSIONAL CORPORATION

Dated: May 28, 1993

John R. Holland
733 East 8th Avenue
Denver, Colorado 80203
Telephone: (303) 860-1331

Kathleen Mullen
Benjamin Sachs
LAW OFFICE OF KATHLEEN MULLEN, P.C.
733 East 8th Avenue
Denver, Colorado 80203
Telephone: (303) 894-0995

CERTIFICATE OF MAILING

I certify that on May _____, 1993, a true and correct copy of the foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, was mailed, postage prepaid, addressed to:

Gale A. Norton, Esq.
Paul Farley, Esq.
Stacy Worthington, Esq.
Wade Livingston, Esq.
Office of the Colorado Attorney General
1525 Sherman Street, Fifth Floor
Denver, Colorado 80202